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Double Reversal on The Application of SECTION 382 to Troubled Financial Institutions

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such policies. Only approximately 16% of the respondent institutions had no policy and were not considering one. Certainly, additional future research is needed to assist the higher education community in responding to this difficult issue." *Working report from the Inter-Association Task Force on Alcohol & Other Substance Abuse Issues Members* at <http://www.iatf.org/parent1a.htm>.

23. Elizabeth Bernstein, "Colleges Move Boldly On Student Drinking Exploiting an Exception to Federal Privacy Laws, Schools Increasingly Notify Parents When Kids Are Caught With Alcohol", *Wall Street Journal* at <http://online.wsj.com/article/SB119690910535115405>. (December 6, 2007).

24. *Id.*

25. Smith, *supra* at note 11, page 17.

26. Peter Schworm, "Emerson revises policy on alcohol: will shield those seeking help," *The Boston Globe*, at www.boston.com/news/.../emerson_revises_policy_on_alcohol, (Feb. 19, 2009).

27. "Student Drug and Alcohol Violations at Institutions of Higher Education: Parental Notification and Access to Student Records" at <http://jsg.legis.state.pa.us/Parental%20Notification%20Drug%20and%20Alcohol.html>.

28. The Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention at <http://www.higheredcenter.org/files/product/notification.txt> (June, 2001).

29. *Id.*

30. *Id.*

31. "College Finds Parents Help Slash Alcohol Violations", *The Washington Times*, at http://www.outsidetheclassroom.com/newsevents/media/article_WashTimes.asp (Sept. 5, 2008).

DOUBLE REVERSAL ON THE APPLICATION OF SECTION 382 TO TROUBLED FINANCIAL INSTITUTIONS

by

Walter G. Antognini*
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INTRODUCTION

Congress has passed provisions intended to limit the shopping for net operating losses and other attributes. Primary among such provisions is Internal Revenue Code section 382. This section provides that when a corporation undergoes a sufficient change in its stock ownership, use of losses and credits from before the change in ownership are limited in periods after the change. In essence, the corporation is limited in the amount of losses to an amount that, at least theoretically, approximates the losses and credits the corporation would have naturally used if the ownership change did not occur.

The rationale for these limitations has long been recognized if not accepted. We have long lived with rules that frown upon the purchase of another taxpayer's tax attributes. But these are unusual times. The financial health of most of our largest financial institutions has deteriorated significantly. The U.S. government has been called upon to assist in preventing further meltdown of our financial system. The very financial

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institutions that the U.S. government will directly aid with the transfer of hundreds of billions of dollars will also have the aid of tax savings (presumably, mostly in the future) from the losses that they are now suffering – unless provisions such as section 382 limit, perhaps severely, those savings. In this context, various government authorities, including from both the executive and legislative branches, have created laws to address the crisis in general, and the limitations on tax savings in particular. A question has arisen as to the validity of some of this guidance directed to the limitation on tax attribute carryovers in light of legislation, both from the recent and the distant past. This paper addresses that question.

One such piece of guidance, IRS Notice 2008-83, reversed the normal 382 rules by providing that a bank's losses from losses or bad debts would not be treated as subject to the section 382 loss limitation rules. Congress then reversed the Treasury's reversal by providing that the Notice would no longer apply prospectively.

ANALYSIS OF INTERNAL REVENUE CODE SECTION 382

The central purpose of Code Section 382ⁱ is to limit the carryover of a corporation's losses, and through section 383ⁱⁱ, to limit the carryover of other favorable attributes, such as credits. This limitation is triggered upon an ownership change of the corporation.ⁱⁱⁱ The central premise behind the limitations is that losses and other favorable attributes are carried over for the benefit of the owners of the corporation at the time that the losses and other favorable benefits were economically accrued. Stated differently, a company's losses and other attributes should not be available for sale through the mechanism of selling a corporation (i.e., its stock) and allowing the new

owners to infuse capital or profitable businesses such that future profits would be protected from taxes by the losses or other attributes carried from years prior to the stock sale.

The premise behind the carrying of attributes is that the taxpayer(s) that suffered the losses would, eventually, be allowed to offset profit years with loss years, thereby smoothing income over time. If new owners were allowed to use the losses or other attributes carried over, a particular taxpayer would not be offsetting profit years with loss years. Instead, the U.S. government would effectively be subsidizing the company's new owners through tax savings. But, what if the new owner (or at least an owner that causes the change in ownership) is the U.S. government? Is the central premise for limiting the use of losses and other attributes violated in this instance? This is the central issue raised by the various authorities discussed in this paper.

Section 382(a) is the main operative provision of the attribute limitation rules. It provides that the amount of taxable income of any "new loss corporation" for any "post-change year" which may be offset by "pre-change losses" shall not exceed the "section 382 limitation" for each year. All of the quoted items in the previous sentence are defined in section 382. Central to all of these definitions is a further term, an "ownership change". The essential test for an "ownership change" is whether the percentage of stock owned by one or more 5-percent shareholders increases by more than 50 percentage points during a testing period of, generally, 3 years.^{iv} A corporation must make the determination of whether an ownership change occurs as of each "testing date".^v Each time an owner shift occurs is a testing date.^{vi} A "new loss corporation" is, generally, a corporation with a net operating loss carryover (or having a net operating loss in the year of an ownership change) or a "net unrealized built-in loss" which

goes through an ownership change.^{vii} A “post-change year” means any taxable year ending after the date of an ownership change.^{viii} The term, “pre-change losses”, refers to the corporation’s net operating losses from years ending before or in the year of the ownership change.^{ix}

The “section 382 limitation” provides the most important limitation on the use of pre-change losses in post-change periods. The theory behind the limitation is to allow the loss corporation to use the amount of loss carryovers it would otherwise use if it had not changed owners. From this theoretical perspective, a corporation would naturally use an amount of losses equal to a normal return on the value of the corporation as well as to offset any net built-gains in assets owned by the corporation. Practically, this term consists of two components, the annual component, described in section 382(b), and the recognized built-in gain component, described in section 382(c)(2). The loss corporation determines the annual component by multiplying the value of the corporation (as measured by the value of all of the corporation’s outstanding stock before the ownership change) by the long-term tax-exempt rate.^x The long-term tax-exempt rate, determined under section 382(f), is based on rates published by the IRS each month.^{xi} The recognized built-in gain component allows the loss corporation to increase its use of pre-change losses for gains that were recognized subsequent to the ownership but economically accrued prior to the ownership change. From a theoretical perspective, a corporation would not naturally be limited in using its own losses, even without an ownership change, to the extent it has gains that were economically accrued in the same timeframe (i.e., the periods before the ownership change) that the carryforward losses accrued. Hence, subject to various limitations, the section 382 limitation is increased for these recognized built-in gains.^{xii}

TROUBLED TIMES

The body of law and understanding built around section 382 had become well established and well entrenched after decades of existence. Then, the crises in the financial markets and financial institutions hit. The continued viability of many, if not most, of our largest financial institutions came into question. Governmental authorities at many levels rushed into the breach in an attempt to stem the crisis. The Emergency Economic Stabilization Act of 2008 (“EESA”)^{xiii} was a major component of these efforts.

Section 101(a)(1) of EESA gave the Secretary of the Treasury the authority, “to establish the Troubled Asset Relief Program (or “TARP”) to purchase and to make and fund firm commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary.”

Section 101(c) of EESA gives the Secretary authority, “to take such actions as the Secretary deems necessary to carry out the Authorities in this Act, including, without limitation, the following:

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(5) Issuing such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of this Act.”

Further, the existing Internal Revenue Code section 382(m) provides authority to the Secretary to prescribe regulations, “... necessary or appropriate to carry out the purposes of this section and section 383, including (but not limited to) ...”, five

different purposes, none of which appear to bear on the five notices indicated below.^{xiv}

The Secretary, citing these authorities, issued various guidance, including IRS Notice 2008-76^{xv}, IRS Notice 2008-83^{xvi}, IRS Notice 2008-84^{xvii}, IRS Notice 2008-100^{xviii}, IRS Notice 2009-14^{xix}, IRS Notice 2009-38^{xx} and IRS Notice 2010-2^{xxi}. In Notice 2008-76, the IRS indicated that it will issue regulations under section 382(m) providing that the term "testing date" shall not include, with respect to a corporation as to which there is a Housing Act Acquisition, any date on or after the date on which the United States (or an agency thereof) acquires stock in a Housing Act Acquisition. In Notice 2008-83, the IRS indicated that for purposes of section 382(h), any deduction allowed to a bank after an ownership change with respect to loans or bad debts (or an addition to a reserve) will not be treated as a built-in loss or deduction attributable to periods before the change date.^{xxii} Further, these banks are told that they may rely on the treatment set forth in the notice unless and until there is additional guidance. In Notice 2008-84, the IRS indicated that it intends to issue regulations providing that the term, "testing date" will be modified to exclude any date as of the close of which the United States owns a more-than-50-percent interest in a loss corporation. In Notice 2008-100, the IRS indicated that it intends to issue regulations providing, *inter alia*, that certain instruments acquired by the Treasury under the Capital Purchase Program pursuant to EESA will not be treated as stock for purposes such as increasing the percentage of stock owned by the U.S. (as a 5-percent shareholder), thereby avoiding the triggering of an ownership change as a result of the acquisition of such stock. But, that stock is still generally considered outstanding for purposes of determining changes in the percentage of ownership of other shareholders. Notice 2010-2^{xxiii} amplifies and supersedes Notice 2009-38 which amplified and superseded Notice 2009-

14 which amplified and superseded Notice 2008-100. It provides, *inter alia*, that for all federal tax purposes, any instrument issued to the Treasury under 5 listed program (e.g., TARP), whether owned by the Treasury or by subsequent holders, shall be treated as debt instruments if denominated as such, and as preferred stock (described in section 1504(a)(4)) if denominated as preferred stock. Furthermore, preferred stock will not be treated as stock while held by the Treasury or other holders for purposes of section 382 except for purposes of valuing the loss corporation (i.e., by valuing all of the stock of the loss corporation pursuant to section 382(e)).^{xxiv} The notices generally provide that taxpayers may rely on them unless and until there is subsequent guidance.

THE AMERICAN RECOVERY AND REINVESTMENT ACT

Section 1261 of The American Recovery and Reinvestment Act of 2009 addresses IRS Notice 2008-83, and only this notice.^{xxv} In a somewhat unusual action, Congress questioned the validity of this particular notice. First, Congress found that the Treasury's authority to write regulations as provided in section 382(m) does not authorize the Secretary to provide exemptions or special rules restricted to particular industries or classes of taxpayers.^{xxvi} Congress then went on to indicate that the notice is inconsistent with the congressional intent in enacting section 382(m) and the legal authority for the notice was deemed doubtful.^{xxvii} Congress nonetheless recognized that taxpayers should generally be able to rely on guidance issued by the Treasury and that legislation was therefore needed to clarify the force and effect of the notice.^{xxviii} Congress therefore deemed Notice 2008-83 to have the force and effect of law with respect to any ownership change occurring on or before January 16, 2009, but will have no force

or effect with respect to any ownership change after such date.^{xxix}

It is significant to note that the Conference Report to The American Recovery and Reinvestment Act made reference to all 5 Notices previously indicated and yet the validity of only Notice 2008-83 was addressed.^{xxx} This strongly suggests that Congress recognizes and blesses the validity of the other Notices.

Was Congress correct in questioning the validity of Notice 2008-83? The best answer, of course, is that the question is now moot. It is certainly within the power of Congress to override executive guidance that relies on Congressional authority in the first place. And, the question of validity and application is now firmly established.

Another question that naturally arises is why Congress singled out Notice 2008-83, leaving the other notices intact. While all of the 5 notices provide for special treatment not specified in section 382, only Notice 2008-83 provides for special treatment without regard to whether the U.S. takes back securities in a company. The other 4 notices address issues that arise when the U.S. Treasury takes back securities and whether the taking back of these securities will cause an ownership change, triggering a limitation of losses under section 382. Perhaps these 4 notices are given special treatment because while the limitation of loss and other attribute carryovers will save the Treasury taxes, application of these limitations will at the same time further jeopardize the fragile financial health of the very companies that taxpayer money is being used to bolster. Arguably then, between the authority granted in section 382(m) and EESA, these other notices should be held valid. This leaves Notice 2008-83 alone as being invalid. This Notice would have had the benefit of saving taxes of,

conceivably, any (section 581) bank that has undergone an ownership change. While it might be argued that in these times, improving the financial health of any and every bank is an important step to economic recovery, Congress clearly indicated that it alone has the authority to single out particular industries for special treatment.

FURTHER ANALYSIS OF SURVIVING NOTICES

As discussed above, Congress has removed the effectiveness of Notice 2008-83, except for the limited period of time before Congress took action indicating its disapproval of the Notice. As such, the effectiveness of that Notice is no longer an issue. But, the other notices remain viable, including, presumably, Notice 2009-38, which amplified and superseded a notice (Notice 2009-14) that Congress specifically recognized and left in place.

In Notice 2008-76, the IRS indicated that it will issue regulations under section 382(m) providing that the term "testing date" shall not include, with respect to a corporation as to which there is a Housing Act Acquisition, any date on or after the date on which the United States (or an agency thereof) acquires stock in a Housing Act Acquisition. A "testing date" is a key component in triggering the application of section 382 limitations. The testing date is the date on which a loss corporation is required to make a determination of whether an ownership change has occurred.^{xxxi} Furthermore, all computations of increases in percentage ownership are to be made as of the close of the testing date.^{xxxii} It would seem, therefore, that if there is no testing date, there is no requirement to determine whether an ownership change has occurred, and, further, there would be no measurements of ownership increases. Based on the literal language of the notice, once the United States makes the appropriate stock acquisition, these

consequences for the corporation would go on forever, even if the United States disposes of its stock. The corporation would be forever free of section 382. Query whether this is what the Treasury intended and whether this broad position will find its way into the actual regulations.

In Notice 2008-84, the IRS indicated that it intends to issue regulations providing that the term, "testing date" will be modified to exclude any date as of the close of which the United States directly or indirectly owns a more-than-50-percent interest in a loss corporation. This notice is similar to Notice 2008-76, discussed above, in that it primarily modifies the term "testing date" by removing certain circumstances from the application of that term. There are, however, a few key differences. First, while Notice 2008-76 precludes a testing date where the U.S. makes a Housing Act Acquisition, Notice 2008-84 can apply regardless of the circumstances under which the U.S. becomes a shareholder. But, second, while Notice 2008-76 can apply regardless of the level of ownership by the U.S., Notice 2008-84 requires the U.S. to be a more-than-50-percent owner. Third, while Notice 2008-76 would under its literal language apply to the corporation forever once it applies at all, Notice 2008-84 only applies as long as the U.S. remains a more-than-50-percent owner. And so, if the U.S. is a more-than-50-percent owner, the section 382 limitations will seemingly not apply to the corporation. This would appear to make sense – imposing an increased tax liability would work to the detriment of its shareholders, with the U.S. the largest such shareholder. Thus, the U.S. would otherwise be taking its own money while potentially harming a company it is purposely trying to resuscitate.

Notice 2010-2 amplifies and supersedes Notice 2009-38 which, in turn, amplified and superseded Notice 2009-14 which, in turn, amplified and superseded Notice 2008-100.

Notice 2010-2 generally treats all instruments issued to the Treasury denominated as indebtedness as indebtedness for all federal tax purposes.^{xxxiii} This rule generally applies to all instruments issued to the Treasury pursuant to specified EESA programs ("the Programs").^{xxxiv} In a similar fashion, preferred stock will be deemed stock described in section 1504(a)(4).^{xxxv} Furthermore, these instruments will not be treated as stock for purposes of section 382 while they are held by the Treasury or by other holders, except that stock described in section 1504(a)(4) will be treated as stock for purposes of section 382(e)(1). These rules in essence provide a safe-harbor of sorts. The general principles of tax law determining the characterization of instruments can be complicated and uncertain. The Notice's rules, to the extent they apply, remove that uncertainty. And, because section 1504(a)(4) stock is not treated as stock for purposes of determining whether an ownership change occurs but is considered stock for purposes of measuring the section 382 loss limitation, then, if an ownership change does occur, the Notice clarifies a pro-taxpayer position.

Notice 2010-2 also provides rules for the treatment of warrants.^{xxxvi} Except for warrants issued pursuant to the Private CPP and S Corp. CPP programs, warrants owned by the Treasury or subsequent holder will be treated as an option and not as stock. Again, this removes a contrary possibility outlined in regulation §1.382-4(d) where an option (such as a warrant) could be considered stock under certain circumstances. A warrant issued to the Treasury pursuant to the Private CPP will be treated as an ownership interest in the underlying stock, but that stock will be deemed preferred stock described in section 1504(a)(4) – again a favorable treatment from a taxpayer's perspective. Any warrant issued to the Treasury pursuant to the S Corp CPP will be treated as an ownership interest in the underlying indebtedness, thus

removing the possibility of having that warrant treated as stock which might otherwise trigger an ownership change.

Notice 2010-2 clarifies that for all federal tax purposes, any amount an issuer receives in exchange for instruments issued to the Treasury under the programs are treated as received in their entirety for the instruments.^{xxxvii} This removes the possibility of applying general principles of tax law which could, in theory, determine a different treatment.

The notice then provides rules more substantive in nature. For purposes of section 382, any stock issued to (and held by) the Treasury pursuant to the Programs shall not cause the Treasury's ownership interest to have increased.^{xxxviii} But, such stock is considered outstanding for purposes of determining the percentage of stock owned by others. This appears to offer the best of both worlds in determining ownership changes. The Treasury will not, in essence, be a shareholder that causes the corporation to surpass the change in ownership requirement, and yet, that Treasury-owned stock will have the effect of lowering the percentage of stock owned by others, thus masking (at least in part) any increase in stock ownership those other shareholders might have. But, caution is advised here. The notice goes on to indicate that if the corporation redeems that stock owned by the Treasury (issued to the Treasury pursuant to the Programs) then the redeemed stock will be treated as though it had never been outstanding.^{xxxix} This treatment is for purposes of measuring shifts in ownership of a 5-percent shareholder on any testing date occurring on or after the redemption of the Treasury. Thus, while the redemption of the Treasury will not trigger an ownership change due to the ownership levels of other shareholders, subsequent owner shifts could trigger an ownership change because increases in ownership by these other shareholders that may have been

previously "masked" (as suggested previously) will no longer be masked.

Notice 2010-2 goes beyond prior notices in addressing the treatment of stock, presumably common stock, which could have been previously held by the Treasury. As previously discussed, if the Treasury buys common stock, this ownership will not trigger application of section 382. But, what if the Treasury sells this common stock (not in a redemption)? Ownership by those new owners could trigger application of section 382. And, all shareholders owning less than 5 percent are treated, as a group, as one 5-percent shareholder.^{xl} But, Notice 2010-2 provides that if the Treasury's sale creates a public group, that new public group's ownership shall not be treated as having increased solely as a result of the Treasury's sale.^{xli} The new public group's ownership is considered outstanding for purposes of measuring other 5-percent shareholders' percentage of stock owned.

In a further rule potentially beneficial to the corporation, a capital contribution made by the Treasury pursuant to the Programs will not be considered to have been made as part of a plan a principal purpose of which is to avoid or increase any section 382 limitation, thus avoiding adverse consequences that might otherwise occur under section 382(l)(1). Section 382(l)(1) addresses a potential abuse. As previously discussed, section 382 imposes a limitation, the annual component of which derives from the value of the loss corporation. Can one increase the value of the loss corporation, and thus increase the annual component of the loss limitation, by contributing to the corporation's capital prior to the measurement of the annual loss component on the change date? Section 382(l)(1) addresses that question, indicating that such capital contribution will not be considered for purposes of section 382, thus precluding the increase in the loss limitation where a

principal for the corporation receiving the capital contribution is to avoid or increase any section 382 limitation.^{xlii} And so, the rule provided by the notice removes this possibly adverse consequence.

Notice 2010-2 addresses another possible issue. If the Treasury acquires an instrument in exchange for an instrument issued to the Treasury under the Programs, will that instrument acquired, and any instrument acquired in a further exchange for that acquired instrument, also be treated under the rules of the Notice? The answer is a partial yes. Paragraphs (C), (D), (E), and (F) apply to these "Covered Instruments", but not paragraphs (A) and (B).^{xliii} Thus, the previously discussed deemed characterization provisions will not apply to the Covered Instruments, but the other, more substantive, provisions will apply. Characterization of the Covered Instruments will be determined under general federal tax law principles.

Finally, the Notice provides rules allowing taxpayers to rely on the guidance indicated in the Notice.^{xliv} The guidance indicated in the Notice will continue to apply unless and until the Treasury issues additional guidance. And, any future contrary guidance will not apply to any instrument issued to the Treasury (or Covered Instrument exchanged for instruments issued to the Treasury) prior to such contrary guidance.^{xlv}

CONCLUSION

Pursuant to IRS Notice 2008-83, banks received a special treatment in which losses on loans or bad debts would not be treated as built-in losses or deductions subject to the limitations under section 382. But, due to Congressional action in the Recovery and Reinvestment Act of 2009, this special treatment

has been limited to ownership changes occurring during a limited period of time.

Other IRS Notices addressing application of section 382 to companies that have received financial assistance from the U.S. remain intact. These notices provide generally that the investments that the U.S. makes in troubled financial institutions will not trigger application of attribute limitations under section 382. As a result, the potential disadvantage of the section 382 limitations should not be considered when deciding whether to receive help from the U.S. And, of course, these troubled institutions will as a result receive both direct financial aid as well as future tax savings should their fortunes reverse, producing taxable profits.

Another, more theoretical, result from the flurry of activity in this area involves the issue of validity of guidance in general. For years to come, section 1261 of the American Recovery and Reinvestment Act of 2009 can be referred to as authority for how far executive branch guidance can and cannot extend without explicit Congressional authority. If it was not apparent before, it appears now that executive guidance cannot be thought of as valid just because pressing circumstances seem to require special rules not contemplated by Congress.

ENDNOTES

- i IRC §382, 26 USC §382.
- ii IRC §383.
- iii IRC §§382 (a), (d), (j).
- iv IRC §382(g) defines the term, "ownership change", while §382(i) defines the term, "testing period". A "5-percent shareholder" is any shareholder is any person owning 5 percent or more of the stock of a corporation at any time during the testing period. IRC §382(k)(7). By

limiting the focus to stock ownership changes of 5-percent shareholders, section 382 generally allows one to ignore changes in ownership of smaller shareholders, as might particularly be the case with publicly-traded companies. For example, a majority of the stock of General Electric owned today may be owned by different shareholders than owned the stock 3 years ago. But if all the changes occurred with shareholders always owning less than 5 percent, these ownership changes can be ignored.

^v Income Tax Regulations §1.382-2(a)(4).

^{vi} Income Tax Regulations §1.382-2(a)(4)(i). Regulation §1.382-2(a)(4)(ii) provides limited exceptions.

^{vii} IRC §382(k). A corporation generally has a net unrealized built-in loss if the aggregate adjusted bases of its assets exceed the fair market value of these assets by a prescribed threshold amount. §382(h)(3). Thus, a corporation can be subject to the section 382 limitations even if it does not have an actual net operating loss prior to the ownership change. The theory is that these net unrealized built-in losses accrued prior to the ownership change will eventually become deductible losses, and at that point these losses are conceptually similar to actual net operating losses accrued prior to the ownership change.

^{viii} IRC §§382(d)(2), (j). More specifically, the post-change year means any year ending after the "change date", IRC §382(d)(2), where the change date is the date of the last component of an ownership shift involving a 5-percent owner, or, in the case of equity structure shift, the date of the reorganization. In essence, the change date is the date of the shift that puts the corporation over the top of the minimum 50-percentage point change within the 3-year testing period.

^{ix} IRC §382(d)(1). Losses in the year of the ownership change are allocated between the periods before the ownership change (and, hence, treated as pre-change losses) and periods after the ownership change (and, hence, not treated as pre-change losses) generally on a ratable allocation based on the number of days in each period.

^x IRC §§382(b)(1), (c)(2), (e).

^{xi} The long-term tax-exempt rate is intended to approximate the rate of Treasury securities of comparable maturities, adjusted downward to account for the differences between taxable securities and tax-exempt securities. See, §§382(f) and 1274(d).

^{xii} While the tax law primarily focuses on the limitation of net operating losses, sections 382 through 384 are not limited to this possibility. For example, the limitations also generally apply to deduction items that economically accrued prior to the ownership but are reported for tax purposes after the ownership change. §382(h)(6)(B). Conversely, income

items economically accrued prior to the change but reported after are generally treated as recognized built-in gains. §382(h)(6)(A). Built-in losses (i.e., a loss from an asset with an adjusted basis in excess of its fair market value on the change date) recognized after the ownership change are generally subject to the same loss limitation rule as net operating losses. §382(h)(1)(B). Capital loss carryovers are likewise generally subject to the same loss limitation rules. §383(b). The overarching goal of sections 382 and 383 is to set one general limit for a corporation's use of pre-change attributes – the section 382 limitation, previously discussed. Having set this one overall limitation, the sections then determine which attributes will in fact be used within the confines of this limitation. This determination is made somewhat more complicated in the instance where credits are carried over from pre-change years. Section 383 addresses this issue. The essence of the rules is that the taxpayer's use of all attributes is limited to the benefit determined by the section 382 limitation. In the case of credits, then, the benefit must be tax-effected. For example, if the section 382 limitation for a particular year is 10,000,000 and the tax savings from that 10,000,000 would be 3,400,000, then the taxpayer can use total attributes that would provide a benefit of 3,400,000. If the taxpayer uses 2,400,000 of credits, then the taxpayer can also use losses that would provide a benefit of the remaining 1,000,000: $1,000,000 / .34 =$ approximately 3,000,000 of losses.

^{xiii} Pub. L. No. 110-343 (2008).

^{xiv} Because none of the five purposes specifically listed in section 382(m) appear to relate to the notices, the reliance on section 382(m) would seem to relate back to the more general authority, "... necessary or appropriate to carry out the purposes of this section and section 383, ...".

^{xv} 2008-39 I.R.B. 768 (September 29, 2008).

^{xvi} 2008-42 I.R.B. 905 (October 20, 2008).

^{xvii} 2008-41 I.R.B. 855 (October 14, 2008).

^{xviii} 2008-44 I.R.B. 1081 (November 3, 2008).

^{xix} 2009-7 I.R.B. 516 (February 17, 2009).

^{xx} 2009-18 I.R.B. 901 (May 4, 2009).

^{xxi} 2010-2 I.R.B. 251 (January 11, 2010).

^{xxii} A bank is as defined in section 581. Section 382(h) is the provision which, *inter alia*, treats an unrealized built-in loss as a loss that is subject to the section 382 limitation. By removing such loan losses and bad debts from the application of section 382(h), these losses will not be subject to the section 382 limitation.

^{xxiii} 2010-2 I.R.B. 251.

^{xxiv} As previously indicated, the corporation is valued for purposes of determining the annual component of the section 382 loss limitation.

This provision in the Notice therefore works to the benefit of the taxpayer in that the preferred stock issued to the Treasury pursuant to one of the 5 listed programs is ignored as stock generally, thereby avoiding an owner shift, but not ignored for purposes of determining the value of the loss corporation, thereby increasing such value and the annual component of the section 382 limitation should an ownership change otherwise occur.

^{xxv} Pub. L. No. 111-5 (2009), signed into law on February 17, 2009.

^{xxvi} Id., §1261(a)(1).

^{xxvii} Id., §§1261(a)(2) & (3).

^{xxviii} Id., §1261(a)(4).

^{xxix} Id., §1261(b)(1). The effectiveness of Notice 2008-83 was also extended to ownership changes after January 16, 2009 if pursuant to a binding written contract entered into on or before such date and under other similar circumstances. P.L. 111-5, §1261(b)(2).

^{xxx} Conference Report to P.L. 111-5, Division B, footnote 55, p.45.

^{xxxi} See, Income Tax Regulations §1.382-2(a)(4).

^{xxxii} Id.

^{xxxiii} 2010-2 I.R.B. at 252, ¶III(A).

^{xxxiv} The Programs include, "... (i) the Capital Purchase Program for publicly-traded issuers (Public CPP); (ii) the Capital Purchase Program for private issuers (Private CPP); (iii) the Capital Purchase Program for S corporations (S Corp CPP); (iv) the Targeted Investment Program (TARP TIP); (v) the Asset Guarantee Program; (vi) the Systemically Significant Failing Institutions Program; (vii) the Automotive Industry Financing Program; and (viii) the Capital Assistance Program for publicly-traded issuers (TARP CAP)". Id., ¶I. This treatment of instruments does not extend, however, to instruments issued pursuant to the TARP CAP program – the treatment of these instruments for federal tax purposes will instead be determined by applying general principles of federal tax law.

^{xxxv} Id. This provision does not apply to instruments issued pursuant to TARP CAP - the treatment of these instruments for federal tax purposes will instead be determined by applying general principles of federal tax law. Section 1504(a)(4) describes stock which in essence represents plain vanilla preferred stock – non-voting, limited and preferred as to dividends without the right to participate in corporate growth to any significant extent, no more than a reasonable redemption price (if any), and not convertible into another class of stock.

^{xxxvi} Id., ¶III(B).

^{xxxvii} Id., ¶III(C).

^{xxxviii} Id., ¶III(D).

^{xxxix} Id., ¶III.

^{xi} IRC §382(g)(4).

^{xli} 2010-2 I.R.B. at 252, ¶III(E).

^{xlii} IRC §382(l)(1)(A). Any capital contribution made within the 2-year period ending on the change date are treated as having this bad purpose unless the regulations provide otherwise. IRC §382(l)(1)(B).

^{xliii} 2010-2 I.R.B. at 252, ¶III(G).

^{xliv} Id., ¶IV.

^{xlv} Id. This reliance also extends to instruments issued to the Treasury (or Covered Instruments exchanged for instruments issued to the Treasury) after any future contrary guidance if there was a binding contract to issue such instruments (or to exchange such Covered Instruments) as of the date of the contrary guidance.